



## University of Baltimore Law Forum

Volume 24  
Number 2 Fall, 1993

Article 6

1993

# Recent Developments: Acuna v. State: Probative Value of Expert Testimony and Evidence of Prior Related Acts Outweighed Any Unfair Prejudice in Child Sex-Abuse Case

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### Recommended Citation

Clark, Joseph (1993) "Recent Developments: Acuna v. State: Probative Value of Expert Testimony and Evidence of Prior Related Acts Outweighed Any Unfair Prejudice in Child Sex-Abuse Case," *University of Baltimore Law Forum*: Vol. 24 : No. 2 , Article 6.  
Available at: <http://scholarworks.law.ubalt.edu/lf/vol24/iss2/6>

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## *Acuna v. State*

### **PROBATIVE VALUE OF EXPERT TESTIMONY AND EVIDENCE OF PRIOR RELATED ACTS OUTWEIGHED ANY UNFAIR PREJUDICE IN CHILD SEX-ABUSE CASE.**

In *Acuna v. State*, 332 Md. 65, 629 A.2d 1233 (1993), the Court of Appeals of Maryland addressed two evidentiary issues in a child sex-abuse case. First, the court determined that a psychologist's expert testimony to the effect that the behavior of the victim was consistent with post traumatic stress disorder ("PTSD") was admissible. Second, the court of appeals found that the trial court had correctly admitted evidence of prior similar, but uncharged, sexual acts.

Gilbert Acuna was charged with a second degree sex offense that arose out of the events occurring on May 21, 1990. The mother of the victim entered the Acuna home on the night in question and found Acuna in bed with her daughter who was age four at the time. The victim was lying back on the bed with her nightgown drawn and her legs spread while Acuna knelt over her. During the course of a subsequent police investigation, the victim alleged that Acuna had licked her "birdie," i.e., her vaginal area, on ten different occasions prior to the night in question. On direct examination, Acuna denied ever having molested the child. The trial judge then permitted the victim to rebut his testimony by describing sexual contact by Acuna on occasions other than those charged in the indictment. Dr. Gail Walter, a clinical psychologist, was hired to evaluate the victim, and testified that, based on the information received from the victim's parents concerning the child's behavior subsequent to the alleged sexual contact, the victim's behavior was consistent with PTSD.

A jury found Acuna guilty of the second degree sex offense. The circuit court merged all of the remaining charges into the sex offense conviction, and Acuna was sentenced to ten years, of which all but eighteen months was suspended. On appeal, the Court of Special Appeals of Maryland affirmed in an unreported opinion. The court of appeals granted Acuna's petition for certiorari.

On appeal, Acuna first argued that absent evidence relating the victim's

symptoms of PTSD to the sexual abuse, Dr. Walter's expert testimony regarding the ties between the victim's behavior and PTSD was irrelevant. *Acuna*, 332 Md. at 68, 629 A.2d at 1234. Second, Acuna argued that the trial court's initial ruling, that the probative value of the alleged similar but uncharged sex acts was outweighed by unfair prejudice, should have insulated his "universal denial" of any molestation from any evidence concerning those uncharged acts. *Id.* at 74, 629 A.2d at 1234.

Regarding Acuna's first argument, the court of appeals recognized that the admissibility of a diagnosis of PTSD and the opinion concerning its source has been equated with the admissibility in personal injury cases of a diagnosis and an opinion concerning causation based on the victim's history. *Acuna*, 332 Md. at 70, 629 A.2d at 1235 (citing *State v. Allewalt*, 308 Md.89, 517 A.2d 741 (1986)). In *Allewalt*, the expert in question did not base his conclusions as to the cause of the PTSD solely on the observed symptoms. Instead, his theory on causation reflected the patient's history. *Acuna* at 71, 629 A.2d at 1235. Therefore, the court in *Allewalt* concluded that because the causation opinion was based on the patient's history, the expert testimony was neither unfairly prejudicial nor an attempt to stabilize the credibility of the victim. *Id.*, 629 A.2d at 1235.

In *Acuna*, the court of appeals gave deference to the fact that Dr. Walter's conclusions regarding the victim's post-abuse behavior being consistent with PTSD were based primarily on the information supplied by the parents. *Id.*, 629 A.2d at 1236. In response, Acuna argued that the history in this case should be distinguished from that of *Allewalt*, because there the history was furnished directly from the victim to the psychiatrist. However, the court recognized that the medical opinion of a child may be based in part on infor-

mation elicited by the child's parents. *Id.*, 629 A.2d at 1236 (citing *Yellow Cab Co. v Henderson*, 183 Md. 546, 553, 39 A.2d 546, 550 (1944)). Therefore, the court concluded that the psychologist's expert testimony was admissible.

Regarding the admissibility of the victim's testimony concerning the similar but uncharged acts, *Acuna* argued that because the trial judge had initially ruled that the evidence was unfairly prejudicial, the victim should have been precluded from testifying about the prior acts. The court of appeals recognized the exception to the rule excluding evidence from prior crimes when: (1) the crime is of a sexual nature, (2) there is a similarity between the charged act and the uncharged acts, and (3) the same accused and victim are involved. *Id.* at 72, 629 A.2d at 1236 (citing *Vogel v. Maryland*, 315 Md. 458, 465, 544 A.2d 1231, 1234 (1989)). Further,

the existence of the other offenses must be established by clear and convincing evidence. *Id.*, 629 A.2d at 1236. The court determined that the primary policy consideration underlying this exception to the rule excluding evidence from prior crimes is that the character evidence involved in sex-crimes is thought to have a higher probative value than usual. *Id.* at 75, 629 A.2d at 1238 (citing 5 L. McLain, *Maryland Practice: Maryland Evidence, State & Federal* § 404.1, at 344 (1987)).

The court of appeals held that because the trial court allowed the victim to testify only on the prior incidents that could be established by clear and convincing evidence, there was no abuse of discretion in overturning its initial determination of inadmissibility. *Id.* at 75-76, 629 A.2d at 1238. Further, the court found that *Acuna's* universal denial of any molestation bolstered the probative value

of the prior acts and helped to justify admissibility: "*Acuna* broke out of the confines, imposed by the circuit court, that had tested relevance, up to that point, by the events of May 21, 1990." *Id.* at 76, 629 A.2d at 1238. Therefore, the court rejected the argument that the prior similar, but uncharged, sexual acts should have been inadmissible.

*Acuna* represents the current trend that the Maryland courts have taken in child sex-crime cases. The prosecution in these sex-crime cases is being granted a fair amount of flexibility in establishing their case, particularly in terms of admissibility of similar offenses. Based on the special consideration that the courts have afforded these cases, it appears that an accused must overcome a heightened emphasis on the probative value of related sex-crime evidence to establish the existence of unfair prejudice.

- Joseph Clark

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